

**EXHIBIT "A"**

**IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA**

|  |   |                             |
|--|---|-----------------------------|
| STATE OF OKLAHOMA, ex rel., W. A.        | ) |                             |
| DREW EDMONDSON, in his official capacity | ) |                             |
| as ATTORNEY GENERAL OF THE STATE         | ) |                             |
| OF OKLAHOMA, and OKLAHOMA                | ) |                             |
| SECRETARY OF THE ENVIRONMENT C.          | ) |                             |
| MILES TOLBERT, in his capacity as the    | ) |                             |
| TRUSTEE FOR THE NATURAL                  | ) |                             |
| RESOURCES FOR THE STATE OF               | ) |                             |
| OKLAHOMA,                                | ) |                             |
|  | ) |                             |
| Plaintiffs,                              | ) |                             |
|  | ) |                             |
| vs.                                      | ) | Case No. 05-CV-0329 GKF-SAJ |
|  | ) |                             |
| TYSON FOODS, INC.; TYSON POULTRY,        | ) |                             |
| INC.; TYSON CHICKEN, INC.; COBB-         | ) |                             |
| VANTRESS, INC.; AVIAGEN, INC.; CAL-      | ) |                             |
| MAINE FOODS, INC.; CAL-MAINE FARMS,      | ) |                             |
| INC.; CARGILL, INC.; CARGILL TURKEY      | ) |                             |
| PRODUCTION, LLC; GEORGE'S, INC.;         | ) |                             |
| GEORGE'S FARMS, INC.; PETERSON           | ) |                             |
| FARMS, INC.; SIMMONS FOODS, INC.; and    | ) |                             |
| WILLOW BROOK FOODS, INC.,                | ) |                             |
|  | ) |                             |
| Defendants.                              | ) |                             |
|  | ) |                             |

**DEFENDANT WILLOW BROOK FOODS, INC.'S COUNTERCLAIM**

Separate Defendant, Willow Brook Foods, Inc. ("Willow Brook"), hereby sets forth its counterclaim against Plaintiffs pursuant to Fed. R. Evid. 13.

**COUNT 1  
CERCLA RESPONSE COSTS**

1. Willow Brook incorporates as though restated herein its responses and denials to the allegations of Plaintiffs' Second Amended Complaint, and asserts this

counterclaim without prejudice to its defenses and positions that: (1) it is not a "Potentially Responsible Party" pursuant to CERCLA, 42 U.S.C. §9607(a); and (2) it is not liable to Plaintiffs in any respect.

2. Plaintiffs allege that the entire Illinois River Watershed ("IRW") including the buildings, structures, installations and equipment, as well as the land to which "poultry waste" has been applied constitutes a "facility" as set forth in CERCLA, 42 U.S.C. §9601(9). (Second Am. Complaint ¶¶21, 71, 80.)

3. Plaintiffs allege that constituents of "poultry waste," including but not limited to: phosphorus and phosphorus compounds, nitrogen and nitrogen compounds, zinc and zinc compounds, copper and copper compounds, and arsenic and arsenic compounds constitute "hazardous substances" as set forth in CERCLA, 42 U.S.C. §9601(14). (Second Am. Complaint ¶¶ 71,73, 79.)

4. Plaintiffs allege that "releases" or "threatened releases" of the substances listed above in Paragraph 3 has occurred at or from the alleged "facility." (Second Am. Complaint ¶¶ 21, 70-71, 79-80.)

5. Plaintiffs allege that Willow Brook is a "Potentially Responsible Party" or "covered person" pursuant to 42 U.S.C. §9607(a), by virtue of Willow Brook's alleged role in the land application of poultry litter in the IRW (Second Am. Complaint ¶¶73-74), and on that basis assert that Willow Brook is jointly and severally liable for response costs and natural resources damages pursuant to 42. U.S.C. §9607. (Second Am. Complaint ¶¶76,88.)

6. Willow Brook has denied the foregoing allegations, including, but not limited to the allegation that Willow Brook is jointly and severally liable for response

costs and natural resource damages. Should the Court find, however, that the IRW or any portion thereof constitutes a CERCLA "facility," that the substances listed in the foregoing paragraph are "hazardous substances" as defined in CERCLA, and that "releases" or "threatened releases" of such substances has occurred, the following additional facts establish Plaintiffs' liability to Willow Brook pursuant to 42. U.S.C. §9613(f).

7. The Plaintiffs are "persons" as set forth in 42. U.S.C. 9601(21).

8. The Plaintiffs own, control and/or operate lands and facilities within the IRW, including, but not limited to Natural Falls State Park, Adair State Park, Cherokee Landing State Park, Tenkiller State Park, Northeastern State University, picnic areas, access areas, offices, right-of-ways, storage facilities and recreational facilities.

9. Upon information and belief, Plaintiffs have released materials onto the land, soil, groundwater and/or surface water at one or more of the lands and facilities which it owns, controls and/or operates within the IRW that contain one or more of the substances listed above in Paragraph 3.

10. Upon information and belief, Plaintiffs own, manage, operate, and/or exercise control (sovereign or otherwise) other properties, facilities and equipment, including, but not limited to septic systems and lagoons, within the IRW for the treatment and disposal of wastewater, including human waste.

11. Upon information and belief, one or more of the aforementioned waste treatment systems/facilities has released onto the land, soil, groundwater and/or surface water of the IRW, one or more of the substances listed above in Paragraph 3.

12. Further, Plaintiffs have directed, authorized, permitted and/or arranged for

the release of one or more of the substances listed above in Paragraph 3, including, but not limited to wastewater from publicly and privately owned treatment works, discharge from gravel mining operations, storm water, industrial waste water, and the land application of biosolids upon the lands and into the waters of the IRW.

13. Accordingly, and subject to the conditions set forth in Paragraph 6, above, Plaintiffs constitute "Potentially Responsible Parties" as set forth in 42 U.S.C. §9613(f) for their equitable share of any past, present and future response costs and natural resource damages established in the prosecution of their claims against Willow Brook.

14. Although other grounds also refute Plaintiffs' claims that Willow Brook is jointly liable, including, but not limited to the requirement of specific causation for natural resource damages, Plaintiffs' status as a "Potentially Responsible Party" renders Willow Brook's liability, if any, for any alleged past, present or future response costs several only and not joint.

15. Willow Brook is further entitled to a declaration that Plaintiffs shall be liable for their allocable share of all future response costs and natural resource damages, if any.

WHEREFORE, Willow Brook asserts that if the Court finds that Willow Brook is liable pursuant to 42 U.S.C. §9607(a), then judgment should be entered against Plaintiffs granting Willow Brook the following relief:

- a. A declaration that Plaintiffs are liable to Willow Brook pursuant to 42 U.S.C. §9607(a), and that they shall bear their allocable share of any proven past, present and future response costs and natural resource damages should any such costs or damages be found by the Court;

- b. A declaration that Willow Brook's liability, if any, for any proven past, present and future response costs and natural resource damages is several, and that Willow Brook shall bear no more than its equitable share of any such liability; and
- c. An award of Willow Brook's attorney's fees and costs, together with any other relief the Court deems just and appropriate.

**COUNT II**  
**CONTRIBUTION UNDER OKLAHOMA LAW**

16. Willow Brook realleges and incorporates herein the foregoing allegations of this Counterclaim, and further alleges as follows:

17. As set forth above, Plaintiffs constitute persons who are liable under 42 U.S.C. §9607(a), and who are therefore liable to Willow Brook pursuant to 42 U.S.C. §9613(f) for their equitable share of any past, present, and future response costs and natural resource damages established in the prosecution of their claims against Willow Brook. Plaintiff's status as liable parties renders Willow Brook's liability if any, as to any alleged past, present, or future response costs and natural resource damages several only and not joint.

18. OKLA. STAT. tit. 12 §832 provides that "[w]hen two or more persons become jointly and severally liable in tort for the same injury to person or property . . . , there is a right of contribution among them even though judgment has not been recovered against all or any of them . . . "

19. "Contribution" under 42 U.S.C. §1113(f) is defined as the common law tortfeasor's "right to collect from others responsible for the same tort after the tortfeasor or has paid more than his or her proportionate share, the shares being determined as a

percentage of fault."

20. To whatever extent Willow Brook is unable to collect the full proportionate and equitable share of costs from Plaintiffs through its counterclaim pursuant to 42 U.S.C. §9613(f), Willow Brook is entitled to recover any outstanding contribution amounts from Plaintiffs pursuant to OKLA. STAT. tit. 12 §832.

WHEREFORE, Willow Brook, asserts that if the Court finds that Willow Brook is liable pursuant to 42 U.S.C. §9607(a), then judgment should be entered against Plaintiffs granting Willow Brook the following relief:

- a. A declaration that Plaintiffs are liable to Willow Brook pursuant to OKLA. STAT. tit. 12 §832, and that they shall bear their allocable share of any proven past, present and future response costs and natural resource damages should Willow Brook be found liable for any such costs or damages;
- b. A declaration that Willow Brook's liability, if any, for any proven past, present and future response costs and natural resources damages is several, and that Willow Brook shall bear no more than its equitable share of any such liability; and
- c. An award of Willow Brook's attorney's fees and costs, together with any other relief the Court deems just and appropriate.

DATED this 14th day of January, 2008.

15/  
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### CERTIFICATE OF SERVICE

I certify that on the 14<sup>th</sup> day of Jan 2008, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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I also hereby certify that I served the attached documents by United States Postal Service, proper postage paid, on the following who are not registered participants of the ECF System:

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